

2009

Larry Roth v. Ronald Joseph, M.D. and Northern Utah Healthcare Corporation dba St. Mark's Hospital : Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca3



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

David E. Ross II; David E. Ross II, LC; Attorney for Appellant.

R. Scott Williams; Peter J. Baxter; Strong and Hanni; Attorneys for Appellee.

Tawni J. Anderson; Eric P. Schoonveld; Jason R. Watson; Hall Prangle and Schoonveld, LLC; Attorneys for Appellee.

Recommended Citation

Brief of Appellee, *Roth v. Joseph*, No. 20090716 (Utah Court of Appeals, 2009).
https://digitalcommons.law.byu.edu/byu_ca3/1844

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE COURT OF APPEALS FOR THE STATE OF UTAH

LARRY ROTH

Plaintiff/Appellant,

v.

RONALD JOSEPH, M.D. and
NORTHERN UTAH HEALTHCARE
CORPORATION dba ST. MARK'S
HOSPITAL,

Defendants/Appellees.

Case No.: 20090716-CA

Trial Court No.: 080901034

BRIEF OF APPELLEE

APPEAL FROM A DECISION OF THE THIRD JUDICIAL DISTRICT COURT

HONORABLE JUDITH ATHERTON

David E. Ross II
DAVID E. ROSS II, LC
Bellemarc Bldg Suite 209
1912 Sidewinder Drive
Park City, Utah 84060
Telephone: 435-602-9869
Facsimile: 435-615-7225
Attorney for Appellant

R. Scott Williams
Peter J. Baxter
STRONG & HANNI
3 Triad Center, Suite 500
Salt Lake City, Utah 84180
Telephone: 801-532-7080
Facsimile: 801-596-1508
Attorneys for Appellee Ronald Joseph, MD

Tawni J. Anderson (Bar No. 8133)
Eric P. Schoonveld (Bar No. 10900)
Jason R. Watson (Bar No. 12272)
HALL PRANGLE & SCHOONVELD, LLC
136 East South Temple, Suite 2450
Salt Lake City, Utah 84111
Telephone: 801-320-0900
Facsimile: 801-320-0896
Attorneys for Appellee St. Mark's Hospital

UTAH APP₁

FEB 1

IN THE COURT OF APPEALS FOR THE STATE OF UTAH

LARRY ROTH

Plaintiff/Appellant,

v.

RONALD JOSEPH, M.D. and
NORTHERN UTAH HEALTHCARE
CORPORATION dba ST. MARK'S
HOSPITAL,

Defendants/Appellees.

Case No.: 20090716-CA

Trial Court No.: 080901034

BRIEF OF APPELLEE

APPEAL FROM A DECISION OF THE THIRD JUDICIAL DISTRICT COURT

HONORABLE JUDITH ATHERTON

David E. Ross II
DAVID E. ROSS II, LC
Bellemarc Bldg Suite 209
1912 Sidewinder Drive
Park City, Utah 84060
Telephone: 435-602-9869
Facsimile: 435-615-7225
Attorney for Appellant

R. Scott Williams
Peter J. Baxter
STRONG & HANNI
3 Triad Center, Suite 500
Salt Lake City, Utah 84180
Telephone: 801-532-7080
Facsimile: 801-596-1508
Attorneys for Appellee Ronald Joseph, MD

Tawni J. Anderson (Bar No. 8133)
Eric P. Schoonveld (Bar No. 10900)
Jason R. Watson (Bar No. 12272)
HALL PRANGLE & SCHOONVELD, LLC
136 East South Temple, Suite 2450
Salt Lake City, Utah 84111
Telephone: 801-320-0900
Facsimile: 801-320-0896
Attorneys for Appellee St. Mark's Hospital

Parties to the Proceeding

The caption contains the names of all parties to this proceeding.

TABLE OF CONTENTS

JURISDICTION	1
ISSUES PRESENTED FOR REVIEW	1
STANDARD OF REVIEW	1
DETERMINATIVE RULES	3
STATEMENT OF THE CASE.....	3
A. Nature Of The Case	3
B. Course Of Proceedings	6
C. Statement Of Facts.....	8
SUMMARY OF ARGUMENT	17
ARGUMENT	19
I. The Trial Court Did Not Abuse Its Broad Discretion In Setting Aside The Default Certificate Against St. Mark's.....	19
II. The Trial Court Did Not Err In Entering Summary Judgment In Favor Of The Defendants On The Ground That Plaintiff's Claim Was Barred By The Statute of Limitations	24
A. The Undisputed Evidence Submitted In Support of Defendants' Summary Judgment Motions Indisputably Established That Plaintiff Knew Or Should Have Discovered His Legal Injury On October 13, 2004, Or At The Very Latest, January 5, 2005	25
B. There Was No Evidence to Support Plaintiff's Claim Of Fraudulent Concealment	28
CONCLUSION.....	30
ADDENDUM	32

JURISDICTION

The Utah Supreme Court had original jurisdiction over this appeal pursuant to Utah Code section 78A-3-102(3)(j) (2009). However, pursuant to Utah Rule of Appellate Procedure 42(a), the Utah Supreme Court transferred this matter to this Court on September 4, 2009. (R. 433.) This Court now has jurisdiction over this appeal pursuant to Utah Code section 78A-4-103(2)(j) (2009).

ISSUES PRESENTED FOR REVIEW

1. Whether the trial court abused its discretion in granting St. Mark's Motion to Set Aside the Default Certificate for good cause under Utah Rule of Civil Procedure 55(c)?
2. Whether the trial court erred in entering summary judgment in favor of St. Mark's on the ground that as a matter of law plaintiff's medical malpractice claim, filed on May 9, 2007, was barred by the two year statute of limitations contained in Utah Code section 78B-3-404(1)?
3. Whether the trial court erred in finding that plaintiff failed to establish a genuine issue of material fact with respect to his claim for fraudulent concealment?

STANDARD OF REVIEW

Order Setting Aside Default Certificate

The trial court's decision on a motion to set aside a default certificate under Rule 55(c) lies within the sound discretion of the trial court, applying a standard of liberality and resolving all doubts in favor of the defaulting party, *Miller v. Brocksmith*, 825 P.2d 690, 693 (Utah Ct. App. 1992), in order to provide the party with its day in court. *Pitts v.*

Pine Meadow Ranch, Inc., 589 P.2d 767, 768 (Utah 1978). Thus, the trial court’s ruling should not be disturbed absent a clear abuse of such discretion. *Fackrell v. Fackrell*, 740 P.2d 1318, 1320 (Utah 1987).

An abuse of discretion is established “only when [the trial court’s] decision was against the logic of the circumstances and so arbitrary and unreasonable as to shock one’s sense of justice . . . [or] resulted from bias, prejudice, or malice.” *Jones v. Layton/Okland*, 2009 UT 39, ¶27, 214 P.3d 859 (internal quotations omitted); *see also Brewer v. Denver & Rio Grande W. R.R.*, 2001 UT 77, ¶16, 31 P.3d 557 (a trial court’s “exercise of discretion . . . necessarily reflects the personal judgment of the court and the appellate court can properly find abuse only if . . . no reasonable [person] would take the view adopted by the trial court.”). In determining whether there has been an abuse of discretion, an appellate court “will not substitute [its] judgment for that of the trial court unless the action it takes is so flagrantly unjust as to constitute an abuse of [that] discretion.” *Marchand v. Marchand*, 2006 UT 429, ¶4, 147 P.3d 538. Even if the appellate court would have reached a different conclusion, “[it] will not substitute [its] judgment for that of the trial court absent an abuse of discretion.” *Deeben v. Deeben*, 772 P.2d 972, 973 (Utah Ct. App. 1989).

Summary Judgment Order

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. *Ward v. IHC Health Services, Inc.*, 2007 UT 362, ¶7, 173 P.3d 186. A

trial court's grant of summary judgment is reviewed for correctness, affording no deference to the trial court's legal conclusions and viewing the facts and all reasonable inferences to be drawn therefrom in the light most favorable to the nonmoving party. *Harper v. Evans*, 2008 UT 165, ¶7, 185 P.3d 573. The reviewing court must "determine only whether the trial court erred in applying the governing law and whether the trial court correctly held that there were no disputed issues of material fact." *Pete v. Youngblood*, 2006 UT App 303, ¶8, 141 P.3d 629.

DETERMINATIVE RULES

Utah Rules of Civil Procedure 55(c) and 60(b) are determinative of the first issue. Utah Rule of Civil Procedure 56 and Utah Code sections 78B-3-404(1) and (2) are determinative of the second and third issues. These rules are set out in the addendum.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This appeal arises from a medical malpractice action brought against defendant-appellee Northern Utah Healthcare Corporation d/b/a St. Mark's Hospital (hereinafter "St. Mark's") and Ronald Joseph, M.D. (hereinafter "Dr. Joseph"), by plaintiff-appellant Larry Roth. Plaintiff's Complaint alleged that Dr. Joseph, a gastroenterologist, was negligent in failing to tattoo a colonic polypectomy site with reliable ink, and that said negligence caused the surgeon (Dr. Voorhees) to subsequently remove the wrong section of the plaintiff's colon and thus made necessary a second surgery to do so.¹ (R. 6-8.)

¹ Plaintiff also separately initiated actions against two other physicians, Dr. Hugh Voorhees and Dr. Peder J. Pedersen, arising out of their care and treatment of plaintiff in

The Complaint also alleged that St. Mark's was liable for the alleged negligence of Dr. Joseph because he was affiliated with and maintained privileges at St. Mark's, and St. Mark's knew or should have known that Dr. Joseph was using an unreliable ink that may have been jeopardizing surgeries performed at St. Mark's Hospital. (R. 9-11.)

Plaintiff served defendants Dr. Joseph and St. Mark's with a summons and the complaint on March 25, 2008. (R. 27-34.) Dr. Joseph timely filed his answer to plaintiff's complaint. However, due to a calendaring mistake by a paralegal in the office of St. Mark's attorneys, Hall Prangle & Schoonveld, LLC (hereinafter "HPS"), St. Mark's did not file its answer until 15 days after it was due. Plaintiff's counsel was aware from prior DOPL proceedings that HPS represented St. Mark's in this matter. Nevertheless, without notice to HPS or St. Mark's, plaintiff secured a default certificate three days before St. Mark's filed its answer. Upon receiving St. Mark's answer, plaintiff moved for a default judgment. St. Mark's attorneys immediately contacted plaintiff's counsel in an attempt to have the default certificate vacated, and then moved to set aside the default certificate and to strike plaintiff's motion for default judgment.

the same underlying surgery. By agreement, plaintiff and Dr. Voorhees submitted their matter to arbitration, which was resolved in Dr. Voorhees' favor on August 22, 2007. (R. 136-37.) On January 12, 2008, plaintiff served Dr. Pedersen with a Notice to Commence Legal Action and subsequently filed a Complaint on August 21, 2008. (R. 138.) Dr. Pedersen filed an answer accompanied by a Motion for Judgment on the Pleadings pursuant to the medical malpractice statute of limitations. (R. 138.) The trial court granted Dr. Pedersen's motion, finding that plaintiff's claims against him were time-barred. (R. 210-14.) This Court recently affirmed that judgment in an unpublished memorandum decision, *Roth v. Pedersen*, 2009 UT App 313. See, further discussion, argument, Point II.A, *infra*.

On September 25, 2008, after reviewing the pleadings and finding good cause shown, the trial court (Judge Judith Atherton) granted St. Mark's Motion to Set Aside the Default Certificate, denied Plaintiff's Motion for Default Judgment, and allowed St. Mark's answer to be entered. (R. 121-122.)

Thereafter, Dr. Joseph, and later, St. Mark's, filed motions for summary judgment under Utah Rule of Civil Procedure 56 on the ground that plaintiff's claims were barred by the two-year medical malpractice statute of limitations, set forth in Utah Code section 78B-3-404(1). After reviewing the pleadings and entertaining oral argument, the trial court granted defendants' motions, finding as a matter of law that plaintiff knew or should have known on October 13, 2004 or, at the very latest January 5, 2005, that he had suffered a legal injury as a result of potential medical negligence in connection with his colonic polypectomy surgery. Therefore, his action against St. Mark's, commenced by his May 9, 2007 Notice of Intent to Commence Malpractice Action, was dismissed with prejudice as untimely.

Plaintiff now appeals the trial court's grant of St. Mark's Motion to Set Aside the Default Certificate and its denial of plaintiff's Motion for Entry of Default Judgment. Plaintiff also appeals the trial court's entry of summary judgment in favor of Dr. Joseph and St. Mark's on the ground that plaintiff's claims are barred by the medical malpractice statute of limitations.

B. COURSE OF PROCEEDINGS

DOPL Proceedings.

On May 9, 2007, plaintiff filed his Notice of Intent to Commence Malpractice Action against Dr. Joseph with the Division of Occupational and Professional Licensing (hereinafter “Division” or “DOPL”). (R. 137.) St. Mark’s appeared in the DOPL proceedings and was represented by HPS. (R. 68.) St. Mark’s denied liability and stated its desire to defend the case on its merits. It was thereafter agreed by and between the parties that a DOPL hearing would serve no useful purpose and the parties stipulated to waive their rights to such a hearing and proceed to litigation. (R. 68.) The Division issued a Certificate of Compliance and the Complaint was filed on January 17, 2008. (R. 1-14.)

Suit Filed; Default Certificate Issued.

On March 25, 2008, service of the summons and complaint were made upon CT Corporation, St. Mark’s registered agent. (R. 27-30.) The summons provided that St. Mark’s answer was due on April 24, 2008. (R. 27-30.) On May 6, 2008, without contacting St. Mark’s counsel to inquire why an answer had not been filed, plaintiff had the trial court enter a Certificate of Default against St. Mark’s. (R. 35.) Due to an inadvertent calendaring mistake by a paralegal in the office of St. Mark’s attorneys, HPS, St. Mark’s did not file its Answer and Jury Demand until May 9, 2008. (R. 36-46.)

Default Certificate Set Aside.

On June 6, 2008, without notice to St. Mark’s or HPS, plaintiff filed a Motion for Default Judgment and Memorandum in Support against St. Mark’s. (R. 47-63.) On July

11, 2008, St. Mark's filed a Motion to Set Aside the Default Certificate, to Strike plaintiff's Motion for Entry of Default Judgment, and to allow St. Mark's answer to be entered. (R. 63-83.) On September 25, 2008, after reviewing the pleadings and finding good cause shown, the trial court granted St. Mark's Motion to Set Aside the Default Certificate, denied plaintiff's Motion for Default Judgment, and allowed St. Mark's answer to be entered. (R. 121-122.)

Summary Judgment Entered.

Four months later, Dr. Joseph filed a motion for summary judgment asserting that plaintiff's claims were barred by the statute of limitations. (R. 127-214.) St. Mark's subsequently joined Dr. Joseph's motion and the matter was scheduled for oral argument on June 19, 2009. (R. 328-9.) On June 10, 2009, St. Mark's filed its own motion for summary judgment, also asserting that plaintiff's claims were barred by the statute of limitations. (R. 329A-407.) After reviewing the pleadings and hearing oral argument, the trial court granted Dr. Joseph's motion for summary judgment, finding as a matter of law that plaintiff knew or should have known of his legal injury on October 13, 2004 or at the very latest, January 5, 2005, and therefore his claims filed on May 9, 2007 were barred by the two-year statute of limitations for medical malpractice actions contained in Utah Code section 78B-3-404(1). (R. 409-411, 430.) On July 28, 2008, plaintiff and St. Mark's stipulated that the summary judgment entered in favor of Dr. Joseph, and the reasons for entering such judgment, applied with equal force to St. Mark's motion for summary judgment. (R. 413.) On August 6, 2009, the trial court granted St. Mark's

motion for summary judgment and dismissed plaintiff's complaint against St. Mark's with prejudice. (R. 423-24.)

On August 26, 2009, plaintiff timely filed his notice of appeal. (R. 425-27.)

C. STATEMENT OF FACTS

Mr. Roth Undergoes Initial Colonoscopy.

On April 24, 2004, Mr. Roth presented to the Wasatch Endoscopy Center to undergo a colonoscopy by Dr. Ronald Joseph. (R. 2.) During the colonoscopy, Dr. Joseph removed a 2.5 cm polyp (and several smaller polyps) that he recorded in his colonoscopy report as being located 15 cm from the anal verge in the distal sigmoid colon. (R. 2, 331.) Dr. Joseph tattooed above and below the polyp removal site ("polypectomy site") with SPOT India ink in order to assist the surgeon in locating the portion of Mr. Roth's colon that needed to be removed in case the 2.5 polyp specimen was cancerous. (R. 3, 331.) The pathology report from the April 28, 2004 colonoscopy showed that the 2.5 cm polyp was an adenocarcinoma, or a cancerous mass in the glandular tissue, and that the adenocarcinoma was probably touching the cauterized surgical margin of Dr. Joseph's polypectomy site. (R. 3, 332.) Based on the pathology report, Mr. Roth was referred to Dr. Hugh Voorhees, a general surgeon, for resection of Dr. Joseph's polypectomy site. (R. 3, 332.)

Mr. Roth Undergoes Resection Surgery To Remove The Tattooed Polypectomy Site.

On May 24, 2004, Mr. Roth underwent a distal sigmoid resection surgery by Dr. Voorhees at St. Mark's Hospital. (R. 3, 385.) During the surgery, Dr. Voorhees could

not find the India ink tattoos that Dr. Joseph had previously marked on April 24, 2004 to identify the polypectomy. (R. 3, 332, 385.) Dr. Voorhees attempted to contact Dr. Joseph, but he was unavailable. (R. 332, 373.) Dr. Voorhees then contacted Dr. Joseph's partner, Dr. Peder Peterson, and requested that he come to the operating room to assist him in identifying the tattooed polypectomy site. (R. 332, 373-74.)

While waiting for Dr. Pedersen to arrive, Dr. Voorhees removed a 25 cm section of Mr. Roth's colon which he identified, based on Dr. Joseph's description of its location in his colonoscopy report, as the most likely area containing the polypectomy site. (R. 332, 373-74.) When Dr. Pedersen arrived in the operating room, he performed a sigmoidoscopy (examination of the colon through the use of an endoscope), but neither physician was able to locate the tattooed polypectomy site. (R. 332, 373-74, 385.) The pathology report from the 25 cm resection showed "normal sigmoid colon without evidence of the prior biopsy site or the India ink tattoos." (R. 385.)

Following the May 24, 2004 surgery, Dr. Voorhees told Mr. Roth that "there was a problem because he couldn't find the dye marks" but "that he felt comfortable that they got everything anyway." (R. 363-64.) Mr. Roth was left with the impression that Dr. Voorhees "couldn't find the dye marks, but he thinks he got it. That's what I remember." (R. 154.)

Mr. Roth Presents for Follow-up Colonoscopy On October 13, 2004 And Is Told That The Tattooed Polypectomy Site Was Still Present.

On October 13, 2004, Mr. Roth presented to Dr. Joseph for a follow-up colonoscopy. (R. 385.) In his operative report, Dr. Joseph noted that upon inspecting the

area of the surgery and previous polypectomy site, he believed that the anastomosis (area of the previous surgery and removal of 25 cm segment) was “slightly proximal” to the previously tattooed April 24, 2004 polypectomy site. (R. 378.) Dr. Joseph further noted that he could see some faint ink in the mucosa and a very small scar between the ink sites, and that all were “just distal to the anastomosis.” (R. 378.) Following the colonoscopy, Dr. Joseph explained his findings to Mr. Roth. (R. 333, 365-66.) At deposition, Mr. Roth testified concerning this conversation with Dr. Joseph:

Q: Do you remember discussing with Dr. Joseph what he had found after he had completed the October 13th procedure?

A: Absolutely.

Q: What did he tell you?

A: *Still there.*

Q: Well, tell me as much as you can remember about that conversation.

A: Just the fact that he says that we have gone in there, and he says, “I can see the scar tissues” - - I don’t remember everything he says, *but basically, it wasn’t removed.* And I don’t know what my reaction was with that. I mean, I was - - *I was not happy*, naturally, but I don’t - - I asked him, “Where do we go from here?”

(R. 365-66) (emphasis added). Mr. Roth was subsequently referred to Dr. Randall Burt at the University of Utah for follow-up treatment. (R. 334, 366.)

Mr. Roth Undergoes Second Follow-up Colonoscopy – Presence of Tattooed Polypectomy Site Again Confirmed By Examination.

On November 8, 2004, Mr. Roth underwent another follow-up colonoscopy at the University of Utah by Dr. Jason Wills. (R. 380-83.) In his colonoscopy report, Dr. Wills noted that “two tattoos were seen proximal and distal to the scar at 13 and 18 cm from the anus” and concluded that the May 24, 2004 “resection, unfortunately, did not include the area of interest.” (R. 380.)

**Mr. Roth Requests and Obtains Complete Set of Medical Records From
Drs. Voorhees and Joseph.**

On December 28, 2004, Mr. Roth contacted Dr. Joseph's office requesting a complete set of his medical records. (R. 394.) The medical records from Dr. Joseph's office contained copies of Dr. Voorhees' and Dr. Pedersen's medical records pertaining to their care and treatment of Mr. Roth. (R. 334.) These records included a June 8, 2004 letter from Dr. Voorhees to Dr. Joseph concerning the May 24, 2004 surgery and the possible problem with the tattoo ink used by Dr. Joseph. (R. 396.) In the letter, Dr. Voorhees informed Dr. Joseph that "[a]t the time of surgery, the tattooing was not found," and further commented:

Our discussion about the tattooing situation was very informative for me and I think in the future, either *differing inks* or earlier surgery *may seem to solve the problem we found ourselves in*.

(R. 396) (emphasis added).

On January 5, 2005, Mr. Roth picked up a copy of his medical records from Dr. Voorhees' office and Dr. Joseph's office. (R. 394, 398.) Dr. Voorhees' records also contained copies of Dr. Joseph's medical records for his care and treatment of Mr. Roth and the above-referenced June 8, 2004 letter between the two physicians discussing the May 24, 2004 surgery and the problem they were experiencing with the SPOT India ink. (R. 335.)

**Mr. Roth Undergoes "Redo Anterior Resection"
of the April 24, 2004 Polypectomy Site.**

On January 24, 2005, Dr. Bradford Sklow performed a "redo anterior resection of the rectosigmoid to resect the polypectomy site at the location of the cancer" identified

during Dr. Joseph's first colonoscopy on April 24, 2004. (R. 334, 385.) Following surgery, the resected segment was sent to pathology for testing. Pathology studies identified the specimen as having "tattoo ink present" and the "polypectomy site present with suture granuloma," indicating that Dr. Sklow successfully removed the polypectomy site identified on April 24, 2004 by Dr. Joseph. (R. 392.) The pathology studies ultimately revealed no malignancies. (R. 391-92.)

Mr. Roth Subsequently Obtains Copies Of His Arbitration Agreement with Dr. Voorhees and Initiates Legal Action Against Him.

On September 19, 2005, plaintiff requested copies of his arbitration agreement with Dr. Voorhees and his consent for surgery. (R. 401.) On May 24, 2006, Mr. Roth filed a Notice of Claim under the Arbitration Agreement against Dr. Voorhees. (R. 404.) Mr. Roth did not name Dr. Joseph or Dr. Pedersen as defendants in that action. On January 25, 2007, Dr. Joseph was deposed as a fact witness in the arbitration. (R. 335.) After a hearing on Mr. Roth's claims, the arbitration panel returned a no cause verdict in favor of Dr. Voorhees. (R. 335, 404.)

Plaintiff Initiates Legal Action Against Dr. Joseph and St. Mark's.

DOPL Proceedings.

On May 9, 2007, Mr. Roth filed a Notice of Intent to Commence Malpractice Action against Dr. Joseph and St. Mark's. (R. 336.) St. Mark's appeared in the DOPL proceedings and was represented by HPS. (R. 68.) St. Mark's denied liability and stated its intention to defend the case on its merits if necessary. The parties later agreed that a

DOPL hearing would serve no useful purpose and the parties stipulated to waive their rights to such a hearing and proceed to litigation. (R. 68.)

Suit Filed.

On January 17, 2008, Mr. Roth filed a Complaint and Jury Demand against Dr. Joseph and St. Mark's, alleging medical malpractice in connection with his polypectomy resection surgeries. Plaintiff served Dr. Joseph and St. Mark's registered agent on March 25, 2008. (R. 27-34.)

Inadvertent Calendaring Mistake.

On March 31, 2008, HPS, counsel for St. Mark's, received the summons and complaint by email from St. Mark's corporate headquarters. (R. 68.) On April 15, 2008, Dr. Joseph filed his answer and jury demand. (R. 15-26.) Due to an inadvertent calendaring mistake by a paralegal in HPS' office, the answer date for St. Mark's was incorrectly docketed 45 days from the date of service instead of the 30 days called for in the summons. (R. 68.) Thereafter, without written or oral notice to St. Mark's or HPS, plaintiff's counsel requested entry of a default certificate against St. Mark's. (R. 69.) On May 6, 2008, the trial court entered a default certificate against St. Mark's. (R. 35.) Without knowledge of the default certificate and believing in good faith that St. Mark's answer was due on May 9, 2008, HPS filed St. Mark's answer three days later, denying all material allegations. (R. 36-46.) On June 9, 2008, HPS received plaintiff's Motion for Entry of Default Judgment. (R. 47-63, 69.)

St. Mark's Attorneys Seek To Vacate The Default Certificate.

Upon receiving plaintiff's motion for default judgment, Mark A. Riekhof, HPS counsel for St. Mark's, immediately contacted plaintiff's counsel, David Ross, and informed him of the inadvertent calendaring mistake and requested that the default certificate be set aside and the motion for default judgment be withdrawn. (R. 80.) Mr. Ross refused to stipulate to setting aside the default certificate, but agreed to an extension of time for St. Mark's to respond to the motion for default judgment and requested a meeting to discuss potential resolution of the case. (R. 80.) On June 19, 2008, Mr. Riekhof and Mr. Ross met to discuss the matter, and Mr. Riekhof again expressed his intention to defend the lawsuit on its merits and requested that Mr. Ross agree to set aside the default certificate and withdraw his motion. (R. 80.) Mr. Ross again refused to acquiesce to his request but made a settlement demand and stated that the time frame for responding to plaintiff's motion for default judgment would remain open. The parties agreed to discuss this matter further upon Mr. Ross' return from vacation on June 30, 2008. (R. 80.)

On June 30, 2008, Mr. Riekhof called Mr. Ross' office and left a voicemail message again requesting that he stipulate to setting aside the default certificate and withdrawing his motion. (R. 80.) On July 1, 2008, Mr. Ross left a voicemail message with Mr. Riekhof stating that he "had never heard of any attorney vacating a default judgment for/on professional courtesy so I don't think that is applicable" and further clarified that he would not agree to set aside the default certificate. (R. 80.)

Default Certificate Set Aside.

On July 11, 2008, St. Mark's filed a Motion to Set Aside the Default Certificate, Strike Plaintiff's Motion for Entry of a Default Judgment, and allow St. Mark's previously filed answer to be entered. (R. 64-83.) After additional briefing, the trial court completed its review of the pleadings and, after finding good cause shown, granted St. Mark's Motion to Set Aside the Default Certificate and denied plaintiff's Motion for Default Judgment. (R. 121-24.) St. Mark's answer was thereafter entered. (R. 121-124.)

Mr. Roth Initiates Separate Legal Action Against Dr. Pedersen, Which Is Dismissed On the Pleadings As Untimely.

On August 21, 2008, Mr. Roth filed a separate legal action against Dr. Pedersen also alleging medical malpractice in connection with his polypectomy resection surgeries. On December 23, 2008, trial court Judge Denise P. Lindberg found that Mr. Roth's claim was barred by the statute of limitations and granted Dr. Pedersen's Motion for Judgment on the Pleadings. (R. 403-07.) Judge Lindberg found that "Mr. Roth knew of his legal injury on or about October 13, 2004, and that he failed to commence legal action against Dr. Pedersen within two years of that discovery. Mr. Roth's claim against Dr. Pedersen, therefore, is time barred." (R. 406.) This Court has now affirmed that ruling.²

² See footnote 1, *supra*.

**Dr. Joseph and St. Mark's File Motion for Summary Judgment Based on The
Medical Malpractice Statute of Limitations.**

In January 2009, after the parties exchanged initial discovery and completed Mr. Roth's deposition, Dr. Joseph filed a motion for summary judgment asserting that Mr. Roth's claims were barred by the statute of limitations. (R. 127-214.) St. Mark's subsequently joined Dr. Joseph's motion and the matter was scheduled for oral argument on June 19, 2009. (R. 328-9.) On June 10, 2009, St. Mark's filed its own motion for summary judgment, also asserting that Mr. Roth's claims were barred by the statute of limitations. (R. 329A-407.) After reviewing the pleadings and hearing oral argument, the trial court granted Dr. Joseph's motion for summary judgment, finding as a matter of law that Mr. Roth knew or should have known of his legal injury on October 13, 2004 or at the very latest, January 5, 2005, and therefore his claims, first filed on May 9, 2007, were barred by the two-year statute of limitations contained in Utah Code Section 78B-3-404(1). (R. 409-411, 430.) On July 28, 2008, Mr. Roth and St. Mark's stipulated that the summary judgment entered in favor of Dr. Joseph, and the reasons for entering that judgment, applied with equal force to St. Mark's motion for summary judgment. (R. 413.) On August 6, 2009, the trial court granted St. Mark's motion for summary judgment and dismissed plaintiff's complaint against St. Mark's with prejudice. (R. 423-24.)

SUMMARY OF ARGUMENT

Default Certificate Properly Set Aside.

The trial court did not abuse its broad discretion in granting St. Mark's Motion to Set Aside the Default Certificate after finding good cause was shown, given that: 1) Mr. Roth knew that St. Mark's had every intention of defending any future lawsuit because it retained counsel, participated in the DOPL proceedings, and clearly expressed its intent to defend the matter on its merits; 2) Mr. Roth's counsel, with knowledge of that intent, made no attempt to contact St. Mark's or HPS prior to seeking the default certificate or filing his motion for entry of default judgment, and even when St. Mark's reiterated its intent to defend the case, Mr. Roth's counsel refused to set aside the default certificate and try the case on its merits, 3) St. Mark's failure to file a timely answer was completely unintentional and inadvertent, as HPS' paralegal in good faith calendared the answer's due date, albeit incorrectly, and St. Mark's filed its answer before any default judgment was entered; 4) St. Mark's was diligent in immediately responding to plaintiff's Motion for Entry of Default Judgment, confirming its intention and desire to defend the lawsuit on its merits, and filing a Motion to Set Aside the Default Certificate; 5) plaintiff has not demonstrated any prejudice nor could he have suffered any prejudice from receiving St. Mark's answer a mere 15 days after its actual due date; and 6) St. Mark's had a meritorious defense as was ultimately demonstrated by the summary judgment entered in its favor.

It is the uniformly acknowledged policy of Utah law to

accord litigants the opportunity for a hearing on the merits, where that can be done without serious injustice to the other party. To that end, the courts are generally indulgent toward the setting aside of default judgments where there is a reasonable justification or excuse for the defendant's failure to appear, and where timely application is made to set it aside.

Interstate Excavating, Inc. v. AGLA Dev. Corp., 611 P.2d 369, 371 (Utah 1980).

Here, St. Mark's acted diligently in moving to set aside the default certificate before a default judgment was even entered. Mr. Roth cannot reasonably claim prejudice as a result of receiving St. Mark's answer 15 days late and before any discovery was even initiated. Therefore, it cannot conceivably be said the trial court's exercise of its discretion to set aside the default certificate "was against the logic of the circumstances and so arbitrary and unreasonable as to shock one's sense of justice . . . [or] resulted from bias, prejudice, or malice." *Jones v. Layton/Okland*, 2009 UT 39, ¶27, 214 P.3d 859 (internal quotations omitted).

Summary Judgment Correctly Granted.

The trial court correctly held that as a matter of law plaintiff knew or should have known of his "legal injury" on October 13, 2004, when by his own testimony he was told that the portion of his colon that had been tattooed for removal by Dr. Joseph "wasn't removed" and was "still there," or at the very latest, on January 5, 2005, when plaintiff obtained copies of his medical records that included a letter from Dr. Voorhees to Dr. Joseph noting that the failure to find the tattooed portion of plaintiff's colon during Dr. Voorhees' surgery could require the use of "differing inks" in the future. (R. 396.)

No Fraudulent Concealment Shown.

Mr. Roth's skeletal (1 page) argument based on the fraudulent concealment provisions in Utah Code section 78B-3-404(2)(b) merits little response, given that it is undisputed that Dr. Joseph told Mr. Roth that Dr. Voorhees had failed to remove the tattooed polypectomy site from his colon on May 24, 2004, and that the records Mr. Roth obtained on January 5, 2005 suggested that the problem might have been with the kind of tattoo ink used by Dr. Joseph.

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS BROAD DISCRETION IN SETTING ASIDE THE DEFAULT CERTIFICATE AGAINST ST. MARK'S.

A trial court is "endowed with considerable latitude of discretion in granting or denying" motions to set aside a default. *E.J. Mayhew v. Standard Gilsonite Co.*, 376 P.2d 951, 952 (Utah 1962) (reversed entry of default judgment because defendant demonstrated desire to defend actions by moving with dispatch to have default set aside and to file answer). That discretion is particularly broad when, as here, it is exercised to set aside a default. Indeed, while Mr. Roth cites Utah cases that have upheld a trial court's refusal to vacate a default as a proper exercise of discretion, he cites no case holding that a lower court abused its discretion in vacating a default certificate.

In *Financial Banc Corp. v. Pingree & Dahle Inc.*, 880 P.2d 14, 16 (Utah Ct. App. 1994), this Court summarily rejected plaintiff's argument that the trial court had abused its discretion in setting aside a default certificate because of the defendant's failure to

timely appear or answer, stating that plaintiff's argument was "without merit and we decline to address it." *Id.* at 16, fn. 1.

Indeed, "it is quite uniformly regarded as an abuse of discretion to refuse to vacate a default judgment where there is reasonable justification or excuse for the defendant's failure to appear, and timely application is made to set it aside." *E.J. Mayhew*, 376 P.2d at 952. Because a request to set aside a default is "equitable in nature and addressed to the conscience of the court, all the attendant circumstances should be considered," *E.C. Olsen v. Cummings*, 565 P.2d 1123, 1124 (Utah 1977), and the court's "discretion should be exercised in furtherance of justice and should incline towards granting relief in a doubtful case to the end that the party may have a hearing." *Helgesen v. Inyangumia*, 636 P.2d 1079, 1081 (Utah 1981).

In support of its Motion to Set Aside the Default Certificate, St. Mark's set forth: the unintentional and inadvertent calendaring error by the paralegal in the office of its attorneys, HPS; plaintiff's failure to give notice to St. Mark's or HPS of his request for default certificate, despite his knowledge from the DOPL proceedings that St. Mark's was represented by HPS and intended to defend the case; St. Mark's immediate and repeated requests to Mr. Roth's counsel that he set aside the default certificate; and, upon the Mr. Roth's counsel's lack of cooperation, St. Mark's prompt filing of an appropriate motion in the trial court.

Under these circumstances, the trial court's finding of good cause shown is not "against the logic of the circumstances and so arbitrary and unreasonable as to shock

one's sense of justice . . . [or to have] resulted from bias, prejudice, or malice.” *Jones v. Layton/Okland*, 2009 UT 39, ¶27, 214 P.3d 859 (internal quotations omitted).

Furthermore, while the trial court's exercise of discretion to set aside the default certificate was clearly appropriate under Utah Rule of Civil Procedure 60(b), which allows a court to set aside a default judgment on motion and “upon such terms as are just” for “mistake, inadvertence, surprise, or excusable neglect...or any other reason justifying relief from the operation of the judgment,” in this case no default judgment was ever entered. Furthermore, while the factors under Rule 60(b) may be relevant to the “good cause” determination under Rule 55(c), many federal cases recognize that the standard for setting aside a default certificate for “good cause shown” under Rule 55(c) is “a lesser standard” than the standard that must be shown for relief from judgments under Rule 60(b). *Dennis Garber G. & Assoc., Inc. v. Pack-Tech Int'l Corp.*, 115 F. 3d 767, 775 n. 6 (10th Cir. 1997); *Fabschutz v. Saxby's Coffee Inc.*, 2008 WL 686912 (D. Colo. 2008) (calendar error); *First Interstate Bank of Oklahoma v. Service Doors of America, Inc.*, 128 F.R.D. 679, 680 (W.D. Okla. 1989) (setting aside default resulting from defense counsel's mistaken docketing of answer date). Indeed, even under Rule 60(b), inadvertent attorney oversights have been found sufficient grounds to set aside a judgment. *See Hancock v. City of Oklahoma City*, 857 F.2d 1394, 1396 (10th Cir. 1988) (setting aside a summary judgment entered after plaintiff's counsel through “mistake or oversight” failed to respond to defendant's summary judgment motion, noting that “a mistake could occur in any office, no matter how well run,” and that it was “but a single incident, completely unintentional and not contentious in nature.”).

None of Mr. Roth's few cited cases are to the contrary. In *Mini Spas Inc. v. Industrial Commission*, 733 P. 2d 130 (Utah 1987), a judgment in an administrative proceeding was upheld where the employer "[w]ith knowledge that the notice was forthcoming and a response was necessary" failed to act in a diligent or reasonable manner and failed to file a response to an employee's claim until three weeks after the response was due. In *Stevens v. La Verkin City*, 2008 UT App 129, 183 P. 3d 1059, this Court upheld the trial court's entry of judgment as a result of a party's failure to respond to a summary judgment motion, noting "the lack of evidence or explanation" as to what happened between the time the motion was received in plaintiff's attorney's office and the attorney's apparent awareness of the motion. *Id.* at ¶15.

Similarly, in *Airkem Intermountain, Inc. v. Parker*, 513 P.2d 429 (Utah 1973), defense counsel was informed in February that the case was set for trial on September 21, but did not try to contact his client until 10 days before trial. The defendant did not contact his counsel until the first day of trial. Under these facts, the supreme court affirmed the trial court's refusal to set aside a judgment because defense counsel's actions did not constitute due diligence, much less establish excusable neglect to justify setting aside the judgment. *Id.* at 431. In *Black's Title, Inc. v. Utah State Insurance Department*, 1999 UT App 330, 991 P.2d 607, the court found it was not an abuse of discretion to refuse to set aside the judgment where the licensee, Black, "merely asserted that he was under a doctor's care and unable to work . . . [but] neither described the illness, nor explained how it wholly prevented him from taking the steps required to maintain contact with counsel, [his company], or the Department." *Id.* at ¶10. Thus, his

neglect in failing to answer until five months after service was not excusable. *Id.* at ¶¶4, 11.

In all of these cases, the court of review held that the trial court did not abuse its discretion in refusing to vacate the judgment. Thus, none of these cases are inconsistent with this case, where the trial court exercised its discretion to set aside the default certificate. *See, e.g., Arbogast Family Trust v. River Crossings, LLC.*, 2008 UT App 277, ¶28, 191 P. 3d 39 (upholding the trial court’s refusal to vacate a default judgment as a reasonable exercise of its discretion, “[a]lthough we might have reached a different conclusion in the first instance”).

Indeed, in this case the only possible abuse of discretion would have been if the trial court had refused to vacate the default certificate. *See, e.g., Helgesen v. Inyangumia*, 630 P. 2d 1079 (Utah 1981). In *Helgesen*, a default judgment was entered against the defendant insurer, Allstate, after Allstate failed to timely answer the complaint. The motion to vacate established that Allstate’s adjuster, with whom the plaintiff’s counsel had been negotiating, was aware of the service of the complaint and summons but failed to forward it to Allstate’s attorney for answering. Nevertheless, the supreme court reversed the trial court’s refusal to vacate the default judgment, expressly noting that given the pre-suit negotiations between the insurance adjuster and plaintiff’s counsel, plaintiff’s counsel should have at least notified the adjuster before seeking a default, stating:

Common courtesy and ordinary professional conduct dictated that before proceeding to the court the [plaintiff’s attorney] should have made contact

with [defendant's representative] with whom he had been dealing with for so long, and to have made inquiry as to why an answer had not been filed.

Id. at 1081; *see also Lund v. Brown*, 2000 UT 75, 11 P. 3d 277 (prior notice that a party is seeking default judgment should always be given in a case where a party in default has appeared in the case).

In this case, after Mr. Roth initiated his action against Dr. Joseph and St. Mark's by filing his Notice of Intent to Commence Malpractice Action on May 9, 2007 with DOPL, St. Mark's appeared at the DOPL hearing with its retained counsel and informed Mr. Roth and the Division of its intention to defend the case on the merits. Thereafter, the parties agreed to waive their rights to a hearing, DOPL issued its certificate of compliance, and Mr. Roth filed his complaint in the trial court. Accordingly, under *Helgesen* and *Lund*, Mr. Roth's failure to provide St. Mark's or its counsel with notice of his intent to initiate default proceedings is simply one more reason why the trial court did not abuse its discretion in setting aside the default certificate.

II. THE TRIAL COURT DID NOT ERR IN ENTERING SUMMARY JUDGMENT IN FAVOR OF THE DEFENDANTS ON THE GROUND THAT PLAINTIFF'S CLAIM WAS BARRED BY THE STATUTE OF LIMITATIONS

The trial court correctly ruled that plaintiff's claim was barred by the medical malpractice statute of limitations. The Utah Health Care Malpractice Act states in pertinent part:

A malpractice action against a health care provider shall be commenced within two years after the plaintiff or patient discovers, or through the use of reasonable diligence, should have discovered the injury, whichever first occurs, but not to exceed four years after the date of the alleged act, omission, neglect, or occurrence.

Utah Code Ann. § 78B-3-404(1). The two year statute of limitations begins to run when the plaintiff or patient knows or reasonably should have discovered that they have suffered a “legal injury,” defined as knowledge both of an injury *and* that the injury may have been caused by negligence. *Foil v. Ballinger*, 601 P.2d 144, 148 (Utah 1979). “Discovery of legal injury, therefore, encompasses both awareness of physical injury and knowledge that the injury is or *may be* attributable to negligence.” *Chapman v. Primary Children’s Hosp.*, 784 P.2d 1181, 1184 (Utah 1989) (emphasis added). A plaintiff “need not determine the identity of the person responsible for his or her injury,” *McDougal v. Weed*, 945 P.2d 175, 177 (Utah Ct. App. 1997), or “have certain knowledge of negligence in order to have discovered it. All that is necessary is that the [plaintiff] be aware of facts that would lead an ordinary person, using reasonable diligence, to conclude that a claim for negligence may exist.” *Jensen v. IHC Hosps., Inc.*, 2003 UT 51, ¶61, 82 P.3d 1076.

A. The Undisputed Evidence Submitted in Support of Defendants’ Summary Judgment Motions Established That Plaintiff Knew Or Should Have Discovered His Legal Injury On October 13, 2004, Or At The Very Latest, On January 5, 2005.

Mr. Roth’s sole argument on the statute of limitations issue is based on his assertion that the trial court erred in holding that his claims were barred by the two year statute of limitations set forth above because in *Roth v. Pedersen*, 2009 UT App 313, this Court found that Mr. Roth discovered his legal injury, at the very latest, when he initiated legal action against Dr. Voorhees in May 2006. *Id.* at *3. Plaintiff’s reliance on this Court’s decision in *Pederson* is misplaced because the order appealed from in *Pederson* was an order granting the defendant judgment on the *pleadings* and not an order of

summary judgment. *Id.* at *1. Therefore, in contrast to this case, the trial court and this Court in *Pederson* could not consider any material facts outside of the pleadings. Even with that restriction, this Court upheld the dismissal because from the pleadings alone it could be determined the statute of limitations began to run at least by May of 2006 when plaintiff filed suit against Dr. Voorhees; thus his complaint against Dr. Pederson, filed in August of 2008, was untimely.

In contrast to the *Pederson* case, this case was decided on motions for summary judgment in which the trial court properly considered outside materials, including Mr. Roth's own deposition testimony that on October 13, 2004, Dr. Joseph performed a follow-up colonoscopy to Dr. Voorhees' surgery and told Mr. Roth that the segment of colon that Dr. Joseph had tattooed and which Dr. Voorhees had intended to remove was "still there" and "it wasn't removed." (R. 365-66.)

Indeed, at oral argument on Dr. Joseph's motion for summary judgment, Mr. Roth's counsel conceded that on October 13, 2004 Mr. Roth knew he had suffered an injury due to Dr. Voorhees' failure to resect the tattooed polypectomy site and that his conversation with Dr. Joseph that day had "set in motion" Mr. Roth's "pursuit" of litigation against Dr. Voorhees. Mr. Roth's counsel stated:

[I]n [the Pedersen] case the Court did find - - and we have appealed it, but it was a final judgment that the date of the discovery of the injury was October 13, 2004. Actually - - and I know opposing Counsel has raised some arguments on that. *I don't think we've ever challenged that. He knew on that date - - I think that's just a factual matter that on that date he was informed by Dr. Joseph that Dr. Voorhees had - - did not resect the polypectomy site. At that point in time he knew that the cancerous tumor was still there. So at that point in time he knew that - - you know, he suffered the injury.*

(Supp. R. 17) (emphasis added).

At that time on October 13th of 2004 Dr. Joseph displayed shock and indicated to Mr. Roth that he was in shock that Dr. Voorhees did not remove the polypectomy site. *At that point in time that set in motion a natural reaction on the part of Mr. Roth. He became extremely angry and agitated, and he directed his agitation at Dr. Voorhees and just set in motion at that point in time a pursuit of Dr. Voorhees.*

(Supp. R. 23) (emphasis added).

Thus, based on Mr. Roth's own deposition testimony and his counsel's admissions during oral argument, there was more than sufficient evidence to support the trial court's finding that as a matter of law Mr. Roth knew of his legal injury on October 13, 2004, and that therefore any claims filed after October 13, 2006 for any injuries arising out of his May 24, 2004 surgery were barred by the two year statute of limitations. Mr. Roth knew on October 13, 2004 that Dr. Voorhees had not removed the polypectomy site as intended, and this knowledge "set in motion" the period of two years in which Mr. Roth had the opportunity to further investigate and determine all parties who might be potentially liable for his injury, including Dr. Joseph.

Utah law is clear that a plaintiff "need not determine the identity of the person responsible for his or her injury," *McDougal v. Weed*, 945 P.2d 175, 177 (Utah Ct. App. 1997), or "have certain knowledge of negligence in order to have discovered it. All that is necessary is that the [plaintiff] be aware of facts that would lead an ordinary person, using reasonable diligence, to conclude that a claim for negligence may exist." *Jensen v. IHC Hosps., Inc.*, 2003 UT 51, ¶61, 82 P.3d 1076.

Furthermore, on January 5, 2005, Mr. Roth obtained a complete copy of his medical records from Dr. Joseph and Dr. Voorhees, including materials that indicated the inability to identify the India ink tattoos placed by Dr. Joseph and that the problem might be resolved in the future by using “differing inks”. (R. 396.) Thus, if not on October 13, 2004, then, at the very latest, the two year limitations period for Mr. Roth’s cause of action against Dr. Joseph and St. Mark’s began to run on January 5, 2005. Using either date, Mr. Roth’s Notice of Intent to Commence a Medical Malpractice Action, which was filed on May 9, 2007, was untimely.

In sum, the trial court’s conclusion is unassailable:

I further find that there are really – that there are no material facts or disputes, and that there’s one of two dates that the outside can be determined to be the operative date, either the date of October 13, 2004, or the outside January 5, 2005.

(R. 31.)

B. There Was No Evidence To Support Plaintiff’s Claim Of Fraudulent Concealment.

The Utah Health Care Malpractice Act further states that

[i]n an action where it is alleged that a patient has been prevented from discovering misconduct on the part of a health care provider because that health care provider has affirmatively acted to fraudulently conceal the alleged misconduct, the claim shall be barred unless commenced within one year after the plaintiff or patient discovers, or through the use of reasonable diligence, should have discovered the fraudulent concealment whichever first occurs.

Utah Code Section 78B-3-404(2)(b). Mr. Roth’s one page argument that the trial court should have found a material issue of fact on its fraudulent concealment claim is frivolous. In order to avail himself of the tolling provision of Utah Code section 78B-3-

404(2)(b) and overcome summary judgment, Mr. Roth was required to demonstrate a material issue of fact that (1) he was prevented from discovering Dr. Joseph's alleged misconduct, (2) due to Dr. Joseph acting affirmatively to conceal the alleged misconduct.

Mr. Roth failed to show a disputed issue of material fact. Indeed, after citing case law defining fraudulent concealment, Mr. Roth made no attempt to apply these cases to the undisputed facts in this case. (Br. of Aplt. at 25-26.) This is understandable given the undisputed evidence set forth above establishing that Dr. Joseph informed Mr. Roth on October 13, 2004 that the portion of Mr. Roth's colon that Dr. Joseph had tattooed for removal was not removed during Dr. Voorhees' surgery, and that on January 5, 2005, Mr. Roth obtained his medical records that included various documents indicating that the problem might have been with the kind of tattoo ink that Dr. Joseph had used in attempting to mark the site prior to the surgical procedure by Dr. Voorhees. As the trial court stated:

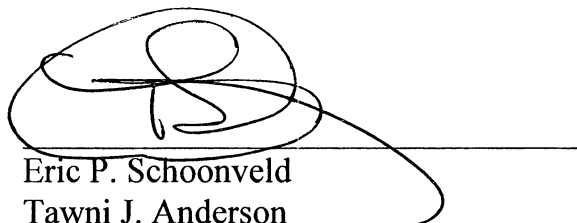
I am unable to find either of the requirements first of an affirmative action to fraudulently conceal the alleged misconduct by the defendant here, nor that it prevented the plaintiff from discovering the injury. Therefore I find that claim [fraudulent concealment] to be without merit.

(R. 31.)

CONCLUSION

For the reasons stated herein, the trial court's order granting St. Mark's motion to set aside default certificate and its entry of summary judgment in favor of Dr. Joseph and St. Mark's on statute of limitations grounds were correct and should be affirmed.

Dated this 19th day of February 2010.



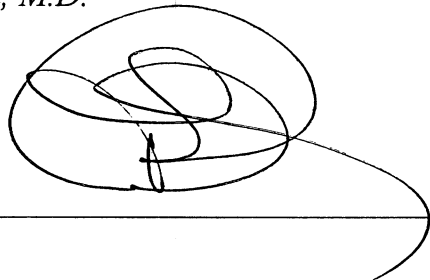
Eric P. Schoonveld
Tawni J. Anderson
Jason R. Watson

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of February, 2010, I caused two true and correct copies of the foregoing to be served by U.S. mail, first-class postage prepaid, on:

David E. Ross II, Esq.
David E. Ross II, LC
Bellemarc Bldg Suite 209
1912 Sidewinder Drive
Park City, UT 84060
Attorney for Plaintiff-Appellant

R. Scott Williams, Esq.
Peter J. Baxter, Esq.
STRONG & HANNI
3 Triad Center, Suite 500
Salt Lake City, UT 84180
Attorneys for Defendant-Appellee Ronald Joseph, M.D.

A handwritten signature in black ink, appearing to be "D. Ross", is written over a horizontal line. The signature is stylized with loops and a long tail that extends to the right.

ADDENDUM

Utah Rule of Civil Procedure 55. DEFAULT

...

(c) Setting aside default. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

...

Utah Rule of Civil Procedure 56. SUMMARY JUDGMENT

- (a) For claimant.** A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move for summary judgment upon all or any part thereof.
- (b) For defending party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move for summary judgment as to all or any part thereof.
- (c) Motion and proceedings thereon.** The motion, memoranda and affidavits shall be in accordance with Rule 7. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.
- (d) Case not fully adjudicated on motion.** If on motion under this rule judgment is not rendered upon the whole case or for all relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.
- (e) Form of affidavits; further testimony; defense required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the pleadings, but the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. Summary judgment, if appropriate, shall be entered against a party failed to file such a response.

- (f) When affidavits are unavailable.** Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.
- (g) Affidavits made in bad faith.** If any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party presenting them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Utah Rule of Civil Procedure 60. RELIEF FROM JUDGMENT OR ORDER

...

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time representation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), or (3), not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.